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ABSTRACT

Four essays present tactics and strategies for administrators involved in collective negotiation. Myron Lieberman, in "Ground Rules, Scope and Proposed Preparation in Collective Negotiations," points out the danger to administrators of saying too much at the bargaining table. R. Warren Eisenhower, in "Grievance Procedures," identifies useful and effective approaches to the construction and inplementation of grievance clauses, and describes in detail the results of misinterpretation and misapplication of the grievance procedure. Harry A. Becker, in "Mechanisms for Settling Collective Bargaining Disputes in Public Education," describes the current status of strikes in the public sector, giving advice on strike avoidance and on strike abatement procedures to be utilized in the event a strike occurs. Fred Lifton, in "Contract Language in Collective Negotiations," identifies numerous pitfalls and difficulties arising from loosely constructed contract clauses and suggests ways of avoiding the inevitable embarrassment connected with such tactical and intellectual lapses. (Author/MLF)

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GROUND RULES, CONTRACT LANGUAGE, GRIEVANCES AND IMPASSE RESOLUTION

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Editors Introduction

1975-76 was a time of strife, turmoil and high drama in public education. A record number of labor disputes, including strikes, slowdowns, and impasses marched past with almost tiresome regularity. A new collective bargaining law was passed in California, the harbinger of a new era of educational-industrial relations in that state. The number of contracts negotiated and the number of grievances filed continued to escalate.

Adding fuel to the fire was the presence of a nationwide economic recession, with concomitant tightening in school budgets and the inevitable destaffing or reduction-in-force (RIF) so well known in private industry. Union leaders were forced more and more into a protectionist posture, fighting to build guarantees of constituent survival into contracts negotiated and, where inevitable, to build in fair and equitable RIF procedures.

Generally speaking, boards of education and administrators, equally as concerned about the future of the teaching staff as union leaders, worked hand-in-hand with teacher representatives to assure equitable arrangements. Even so, paranoia among teachers and, in some instances, middle-level managers ran high in 1975-76. Principals in Arlington, Virginia, home of AASA, continued to strengthen their recently formed union, the Arlington Association of School Administrators and Supervisors, AFL-CIO, adopting a frankly protectionist posture. Administrators in other school units throughout Maryland, D.C., and Virginia watched this union's development closely, apparently weighing the pros and cons of like affiliation. All-in-all, it was a nervous time for educators.

The presentations contained in this little volume are pithy, timely statements made by four of the most knowledgeable persons extant in the field of negotiations. Myron Lieberman, almost a legend in his own time, discusses "ground rules, scope and proposal preparation in CN". This is a practitioner's primer made up of helpful hints on negotiations. As always, Lieberman cuts to the heart of things and leaves the reader with a number of useful and usable constructs. Fred Lifton, the Chicago labor lawyer and contract specialist, is at his elegant best in his presentation on "Contract Language in CN". He identifies numerous pitfalls and difficulties arising from loosely constructed contract clauses and suggests ways of avoiding the inevitable embarrassment connected with such tactical and intellectual lapses.

Warren Eisenhower, a well-known and astute practitioner of labor relations, describes the hazardous labyrinth of grievance processing in public education, a matter of grave concern at this time. He identifies useful and effective approaches to the construction and implementation of grievance clauses, and describes in gruesome detail the results of misinterpretation and misapplication of the grievance procedure. Harry Becker, long-time superintendent and veteran of a number of work stoppages, describes the current status of strikes in the public sector, giving helpful advice on strike avoidance and on strike abatement procedures to be utilized in the event that one does, in fact, occur. Interestingly enough, Becker concludes that strikes, all arguments to the contrary notwithstanding, may not be the worst thing that can happen to a school district.

Altogether, this collection is a useful, information-filled "state of the art" presentation. The reader will glean from it useful and relevant tactics, strategies and, on occasion, homely similitudes of particular assistance as he continues the search for a viable <u>modus vivendi</u> in educational-industrial relations.

PC
RH
JR

Ground Rules, Scope and Proposed Preparation

in Collective Negotiations

by Myron Lieberman

Bargaining should be looked at as an agreement-making process. One should not do anything that unnecessarily impedes agreement. Don't make any rules for bargaining that are going to make it more difficult to get agreement. It can be tough enough without generating procedural difficulties of your own. In saying that bargaining is an agreement-making process, I mean that it should be conceptualized that way; I certainly do not mean to suggest that you ought to agree to proposals or make concessions, regardless of their merits, just to get agreement. Quite the contrary. I've always taken the position that the school board should never agree to anything that significantly impairs their ability to run the district. Even with that philosophy and approach, it ordinarily has not been too difficult to get an agreement.

I have a strong conviction that one ought to spend as little time as possible at the bargaining table, since management is there to give away things, and the less time management is there the less it is going to give away. The pressure to get the agreement and the pressure to add to it will come from the union side, whether it's a teacher union or some other union.

The new California law mandates released time with pay for teachers to bargain and to process grievances. Knowing the tremendous amount of time that bargaining and grievance processing has consumed in other states, it seems to me that Californians are going to have a tough time now that

the teachers and the other unions have a vested interest in dragging out the process. There is some status in getting out of the classroom and being on the bargaining team. In the private sector some companies have taken a strike rather than allocate more time to shop stewards to process grievances on company time.

Ground Rules

Ground rules are mutually negotiated. One ought not to spend a great deal of time on them. In the early days of the 1960's, the parties often haggled about ground rules for weeks and months, even more so than about the substance of the contract. I feel that it is non-productive to try to set up a schedule far in advance. First, I don't believe in bargaining early. The earlier you start bargaining, the more temptation there is on the part of the unions to put extravagant demands on the table and not to give them up. It's only as the deadline draws closer that the unions become more and more realistic about what they want and require. When it comes right down to the wire and you're saying, "Well, do you want the agreement or don't you?" a decision is made.

The atmosphere ought to be both friendly and businesslike to the extent that you can make it so. You cannot predict the course of bargaining and so a long schedule often breaks down. You get started and then discover that your information needs or the developments that occur make changes necessary.

One problem that comes up frequently is what you're going to do about announcements. If you're on the school board side, people in the community want to know about the course of bargaining, how you're doing, and whether you're getting anywhere. The teachers and other employees of the district also want to know. I would say that as a rule the less you get into the public arena the better. To illustrate that, I once negotiated for a school district in Rhode Island. When I came on the scene the board had insisted that bargaining be done in public sessions. That, of course, is a very serious mistake for several reasons. For one thing, they had the naive idea that the concerned taxpayers would show up. Needless to say, the teachers are the ones that show up and pack the meeting, booing the board representative and cheering the teacher representative. Another thing is this: I said to the board, "Well all right, I'll represent you, but that procedure has to stop." And the board said, "We can't change that; we're the ones who insisted on it." "There," I said, "is exactly the reason it has to go. You've illustrated the saying that "as soon as you take a public position it becomes hard for you to shift that position." So we had to go through a very elaborate charade where things were worked out away from the table. Then we'd go to the table and the teachers would say, "We propose so and so..." and we would make a counter proposal. Fortunately we never had to get involved in that charade again. But, do not get yourself or the union where it's difficult to move away from a position. Now there are problems here. I have tried to get the unions to agree that there will be no announcements except joint announcements, the advantage of that being that you obviously are not going to agree to a joint announcement saying that the board is a group of stubborn die-hards

bleeding our hard-working teachers to death! And you can also agree that unless and until an impasse is reached (which means not simply that there is disagreement on particular items, but that you've sort of given up on all items that were considered and that bargaining has stopped), there will be no announcement. Now this is complicated by the fact that the union will want to communicate with its members from time to time and in doing so it may say things that exacerbate the disagreements. You have to bear in mind that one of the most difficult things on the union's side is the art and science of raising the expectations of its members. If the board feels that the teachers really care about something, the board is not likely to try to get a concession on that item. So the union representative needs a display of militancy, or a demonstration that the members really want this. I remember once talking to Al Shanker when they were going to have a demonstration in front of the Board of Education and there was a pouring rain. His attitude was that was great, for it they could get 5,000 people out there in the rain, that would really convince the board that the teachers were dead serious. You get many strikes because the union leader will try to generate militancy or aggressiveness, and then what there is to offer won't meet that level of expectation. Though it's a very risky process for the union, I'm just saying that the board wants to try to influence the tone of the announcements so that, from the beginning, you are deflating the expectations of the other side. Now, you do have the right to communicate with employees. I don't think you ever want to agree to something that deprives you of your right to communicate with them. Of course, communicating directly with them about items that are being bargained about is not a normal procedure unless you feel that there has been a misrepresentation by the union. But you do have the right to

communicate with your own employees.

Now, with respect to proposals, I think it is usually better to wait for the union proposal, to review it carefully, and then to draft the comprehensive management counter-proposal. In reviewing union proposals, you have to be careful so that simply asking a question does not convey the impression that you are considering making a concession on that item. I think you should be very careful to make that clear. But you do have to ask the union, because often just in the course of asking them to clarify the proposal or give you the data or whatever, you will discover what they are serious about and what they are not. This is especially the case where they are using these very elaborate, canned proposals that they get from the state association. They just fill in the name of the local association, and they've got a one hundred-page proposal.

Coming out of a plane, I chatted with two board members from a district in California. The California bill requires that union proposals be read at an open board meeting. This is one of the ambiguities in the statute--that the proposal should be "announced." So one of the things that they were uncertain about was whether they ought to have the proposal read or not. I guess they decided to have it read. It took something like two and one-half hours to read the very elaborate union proposal. I'm not sure that I would advocate that; however, if the union is going to make elaborate proposals, I think one ought to have them pay the price, as it were, by going to the table and explaining all their data as well as the rationale for the proposal. This, by the way, is one reason why I do not believe, except maybe in the smallest districts, that superintendents ought to be on bargaining teams. A lot of time spent in bargaining is

waiting for the other side to make up it's mind, or going through some of these procedures that you really have to go through even though the outcome is preordained. Well then, if you go down that list of proposals with them and you say, "Well, how long did it take you to prepare these and what's the data," and so on, you find out very quickly what they have information about and what they don't. Try to caution boards against getting big fat union proposals and then immediately breaking their necks to develop detailed answers to every item in the union proposal. There is a tendency to do that. I think that if the union hasn't really got together a case, there is no reason for you to spend days working to rebut a proposal that wasn't meant to be taken seriously in the first place.

I think you ought to be careful to avoid consultation at the bargaining table. This again is a more acute problem in California and some other states because the California bargaining law provides for consultation rights. Now consultation is a very elastic process. If you have a strong union leader and a weak board representative, consultation turns into bargaining. It's just like having a teacher and a paraprofessional in a classroom, and if the paraprofessional is strong and the teacher isn't, the paraprofessional sort of takes over. But one should not take the position that you will not talk about it simply because an item is not within the scope of bargaining. However, it is very difficult to go from a bargaining procedure to a consultation procedure with the same group and at the same time and under the same circumstances. S the answer, let's say, to a union proposal that you regard as outside the scope of bargaining, should not be, "We aren't going to discuss that because it's not within the scope of bargaining," but rather "We're interested in that and

we would like to discuss it with you, but let's not do that at the same time we're trying to hammer out a collective bargaining agreement."

Avoid giving the union a target. I think that some boards do this when it comes to establishing whether managerial prerogatives are within the scope of bargaining. They take the position that if it's outside the scope of bargaining they're not going to talk about it, and that can be used by an astute union leader who is trying to whip up the troops. It can be used politically. But if you will say, "Yes, we're interested in that and want to pursue it, though not in this context," it seems to me that you're less vulnerable.

Now it's important for you to have proposals of your own and to keep them on the table until the very end. The reason for this is that if you should go to an impasse, or to fact finding, it will be strategically helpful for you to have proposals of your own still on the table for this constitutes some risk for the union. If the only proposals left when you go to fact finding are things that they want, they have nothing to lose. But if you can go to the impasse procedure with a management proposal still on the table, the fact finder or mediator will have the leeway to suggest a settlement that is closer to your position than would otherwise be the case. So don't give up everything that you proposed until the very end. I don't mean, however, that you should have a long laundry list because, presumably, you're narrowing the area of disagreement as you proceed.

In preparing proposals, different negotiators have different approaches. One successful procedure is to review your own policies and practices, get the union proposal, meet with them to go over everything and try to get the data, the arguments, and the rationale, and then put together a com-

prehensive proposal of your own. Then you hand that to the union at the next meeting because you prefer to talk from your piece of paper rather than from theirs, and because you're trying to get them down to reality. You see, when they go from a maximum of $3,000 to a maximum of $19,000, they're giving away fictitious dollars. When you go up, you're talking about real dollars. Your problem is to try to get their position as close to reality as possible. One way to do that, of course, is to start talking from a realistic document instead of an unrealistic one.

It is desirable to include some items of agreement in your first draft to get the ball rolling. Now that agreement might have to be on what year it is or on the severability clause of something of that nature! But try to get some agreement on some items.

Try to control the drafting process. That's very important because if you can control the process you will have a great deal more control over the substance of the agreement. In fact, if you have a union negotiator who represents eight or ten districts, it gets to be an overwhelming secretarial job to keep drafting comprehensive proposals over and over and over again. Sometimes you may have to go back and forth, with you drafting one and then them drafting one, but usually management will be left with that kind of task. And when you go to the table, if you've drafted a comprehensive counter-proposal the timing is on your side.

I think it is important for you to read other agreements very carefully, especially those from districts that are comparable to your own--in your own state or from other states. They will not be models but they might show you what to watch out for. Ask yourself what the restrictions mentioned would mean if they were applied to your district. You have to be

careful because it's not always possible to tell what the impact of the agreement will be on a district. You may have a salary schedule which at certain points seems to be very generous but that district may not have anybody on a salary schedule at that point. So, often you cannot really appreciate what you're looking at, but it will pay you to get a number of agreements from other districts and look at them. In fact, it would pay you to get the original proposal that was submitted, if you could, and compare it with the final document. The first time, or the first few times, that the board representatives see these very elaborate proposals, it just seems like, "Good heavens, how can we ever get an agreement in the face of all these extravagant proposals?" It will give you more of a sense of reality if you can compare initial proposals with final agreements.

It is normally not a good practice to include a statute or a paraphrase of one in your stated board policy. (Very often if you paraphrase a statute and adopt it, the paraphrase misleads you in your interpretation of the actual statute.) You are still subject to the statute, of course, but do not adopt it as formal board policy. Sometimes boards have adopted statutes and the statutes have changed and the board didn't even know about it. Furthermore, if you've adopted a statute as board policy this can increase the number of items that are grievable under the contract. If there is a statutory benefit and the item is not board policy, the only remedy for a teacher would be a statutory one, but if you incorporate it as board policy, you will give teachers a contractual remedy on that item in addition to a statutory one.

GRIEVANCE PROCEDURES

by

R. Warren Eisenhower

Introduction

The twentieth century, particularly the second half, has been labeled in many different ways--the age of progress, the machine age, the space age, the age of computers, and more recently, the age of protest. Perhaps it is only fitting that in an age when protest has been rather commonplace, concern about grievances and their resolution has become increasingly important in educational circles.

In terms of language, "protest" and "grievance" may be used synonymously, but when implemented, both words signify the presentation by an individual or a group of some wrong with the notion of gaining redress. Whether the wrong is real or imagined, the desire for satisfaction persists.

Since the day when Cain filed the first grievance against Abel, conducted his own hearing, weighed the evidence, and decided upon his course of action, protests and grievances have become rather common occurrences. But today, when inhibitions which once restrained many forms of protest have been cast aside, the significance of a grievance in a work situation has come to be recognized.

Since workers are living in an atmosphere intensified by both violent and nonviolent protests, it would be naive to assume that this would not also affect the domain of school work. To the extent that it has and will continue to do so, it has strengthened the need for processes by which resolutions may be developed.

Grievance Administration

Grievances and the complaints of workers are as old as the employment relationship itself. Employees have always felt aggrieved. Before the advent of unions, most employees kept quiet because they were afraid of losing their jobs. Today employees in organized units have the right to discuss their grievances with management through the grievance procedure. Although grievance procedures were initiated in the late nineteenth century, most of them have evolved since the Wagner Act was passed in 1935. Today grievance procedures are found in almost all union contracts.

Definition of Grievance

Management frequently disparages the grievance procedure because many of the items which are processed are not grievances under the contract, but complaints. In other words, if an employee grieves about his work schedule (which is incorporated in the contract), it is a grievance. If he grieves about the lack of sanitary conditions in the washroom (not covered by the contract), it is a complaint. In other words, all grievances are complaints, but not all complaints are grievances.

The open or unlimited approach to the handling of grievances attempts to bring all dissatisfactions of the worker to the surface and to solve them equitably. Thus, a grievance could be defined as any dissatisfaction arising out of the employee's relationships with the organization. Regardless of whether a grievance is related to wages, hours, or terms of employment, whether it is expressed, or whether it is valid, it must be resolved or the dissatisfaction will ultimately become a grievance under the contract.

Assuming such an unlimited approach to the grievance procedure, grievances may arise: (1) through contract interpretation or through conflicts between two or more sections of the contract; and (2) through issues which arise outside the contract because the contract says nothing about the issues or the issues are so unique that the contract could not possibly cover them.

Nature of the Grievance Procedure

Many different types of grievance procedures are used today. These procedures vary with the size of the organization, the character of the industry, and the types of labor-management representation. A typical grievance procedure would normally have from two to five steps. An example of a four-step grievance procedure normally would involve the following union and management representatives: Step One: the Principal, the Building Representative, and the aggrieved employee; Step Two: the Principal, his supervisor, the Building Representative, a Union Representative, and the employee; Step Three: the Superintendent, the Principal, the Building Representative, and the Union Representative; and Step Four: arbitration.

As the grievance moves through the procedure, an attempt is made to submit it, through successive steps, to different representatives of union and management at increasingly higher levels of authority. By such a procedure, different views of the problem are elicited and perhaps some mutual ground for solving the problem will be found. In most cases, the number of steps in the procedure is limited so that the grievances may be resolved quickly at the lowest possible level. In this way, the meaning and flavor of the grievances are not lost before they reach top management.

Pressure Tactics

During the term of the contract, union members may use different types of pressure tactics to achieve their objectives outside the grievance procedure. The simplest

tactic is the wildcat strike which deliberately violates the contract and, if located strategically, it can shut down an entire school. Another tactic is the threat of a strike or wildcat strike if a particular issue in the grievance procedure has not been settled satisfactorily. Slowdowns have been particularly effective as a pressure tactic. Sometimes the contract itself is used (e.g. refusal to be transferred temporarily to another school or refusal to work overtime). In still other ways, the union may employ working practices to achieve its objectives. Lastly, the grievance procedure may be flooded with grievances so that it breaks down and the administration of the contract stops.

Frequently these pressure tactics have been used by the union to gain more favorable contract terms through revision, amendment, and alteration of the original agreement. In organizations where management attempts to counteract these tactics by adopting firm policies on discipline and discharge for deliberate contract violations, the pressure tactics often are discarded and excellent labor-management relations are established. In many areas where management has been unable or unwilling to take any action against these pressure tactics, the organizations have been faced with increasingly higher costs of operation.

The use of pressure tactics by unions is usually related to the majority and stability of the labor-management relationship. In the initial stages of a relationship, the union tends to use more of these tactics. If, as time passes, management feels that it must improve its competitive position by the elimination of these tactics, by firmly insisting that the union live up to the contract, it can usually win union support for the elimination of such tactics by a minority group of union members.

Processing Grievances

Handling employee grievances is a major responsibility of all school administrators. When this responsibility is met effectively, school systems benefit through higher morale and greater productivity. When handled incompetently, employee grievances can lead to serious problems: chronic employee dissatisfaction; an increase in absenteeism; and loss of efficiency. To prevent such problems, administrators must understand and be able to define clearly the nature of the grievances and to develop clear-cut guidelines for dealing with them in an equitable manner.

A grievance, of course, means different things to different people. Labor-management contracts often refer to grievances as controversies or disputes arising from the application or interpretation of clauses in the collective agreement. In its more general use, the word is used to denote a specific gripe or complaint.

There are various stages of worker dissatisfaction that culminate in the official expression of a grievance. The first stage begins when an individual is irritated or unhappy about something in the organization. Perhaps he had to wait in line to get something he needs; or he could not get his personal leave scheduled after a holiday; or he was late to work because of a traffic jam; perhaps the principal yelled at him unjustly yesterday. The possibilities are infinite. The important thing to remember, however, is that something in the

work situation has upset the employee, though he may say nothing about it at first.

The next stage of dissatisfaction is reached when an employee begins to complain openly about the irritation, either to his principal or to fellow employees. At this stage, complaints are usually not put into writing. They may merely represent verbal attempts to "clear the air".

The final stage of dissatisfaction is reached when the employee is so disturbed by a situation that he seeks definite action. At this point, a written complaint is usually prepared for presentation to union or management representatives. However, the principal should not assume that all is well just because there are no written grievance presented to him. Needless to say, employees can be quite irritated without putting their complaints in writing. It is the job of the principal to develop a special sensitivity for picking up unarticulated grievances.

Constructive Grievance Handling

When handling employee grievances, a principal has the choice either of adding to the problem or of attempting to solve it. By shirking his responsibilities in this area, he will definitely add to the problem. For example, he may pass the buck, argue with employees who present grievances, or look for an easy way out. On the other hand, principals who follow proven guidelines can become problem solvers rather than problem makers.

Some grievances are never settled because the source of irritation is not uncovered. Thus the principal discovers that the same grievance is often presented time after time. For example, an employee frequently complained to his principal that his pay was not in line with others with the same experience and training. His complaints continued even after the principal had explained the pay system. Finally, during a long discussion, the truth came out: The employee was not really concerned about his pay; he was worried about keeping his job since he had heard rumors concerning a tight financial picture and the possibility of layoff. After being told that he would not be affected, the employee stopped complaining.

This example is not an isolated case. Many stated grievances are often merely cover-ups for other things that are bothering employees. In this respect, a grievance is like an iceberg--that is to say, the causes of grievances often lie far below the surface, and it is the job of the effective administrator to uncover them.

Get the Facts

Without having the facts surrounding a grievance, administrators cannot hope to deal with employee problems effectively. To gather such facts, the administrator must begin by asking questions such as: What is the problem? Where did it occur? Who was involved? When did it start? Why is it a problem? Were there any observers? Has the problem ever occurred before? Have other administrators confronted similar grievances? How did they deal with them? Are there any records that can shed light on the matter?

As might be expected, obtaining needed information requires much time and effort. However, the time is clearly well spent if it leads to solutions that will prevent similar grievances at a later date.

Identify and Evaluate Possible Solutions

After the real cause of a grievance has been determined and all facts pertaining to the situation have been obtained, administrators can begin to develop possible solutions for handling the grievance. In so doing they should carefully re-examine the nature of the grievance and reconsider all available information. They may discuss the matter with a superior, or with other administrators, and investigate how similar cases were handled in the past.

By carefully considering possible solutions, the administrator can avoid making snap judgments. Needless to say, spur-of-the-moment decisions often make the employee feel that the administrator is callously indifferent to his grievance. In short, the employee assumes that the boss is not interested enough to get the whole story.

While the administrator can avoid some trial and error by considering measures that have worked in the past, he cannot determine whether he has selected the appropriate solution until it has been put into practice. Thus, in the final analysis all solutions can be evaluated only in terms of how well they account for all the facts surrounding a particular grievance.

Applying the Solution

Once a solution is chosen, it must be put into action. While this may seem quite obvious, it is usually at this point that effective problem solving breaks down. An employee naturally expects some sort of action when he files a grievance. Therefore, why postpone action when the facts show what needs to be done? If you go to a doctor with an ailment, you don't expect to wait six weeks before he prescribes medicine for you.

Once a solution is put into action, the administrator should follow up to see if the employee is satisfied. What is his response to the solution? By following up on his solution to the problem, the administrator can see if any additional action is required.

Be Accessible and Open-minded

All administrators must indicate a continued willingness to hear employee complaints. In general, this means that each administrator should maintain a known open-door policy. However, words alone are not enough. The good administrator also makes it known through his actions that employees are welcome to discuss their grievances with him. If employees feel that they cannot speak freely with their administrator, minor complaints will often grow rapidly out of proportion.

Above all, an administrator must be willing to let the employee tell the whole story as he sees it. Do not interrupt him unless it is absolutely necessary

to clarify a point. Do not try to finish off some paperwork while the employee talks. Instead, make him feel he is the center of your interest by giving him your full attention.

Frequently, we see things only from our own point of view. To prevent charges of unfairness, the worker's viewpoint should be given careful consideration. In other words, the administrator should make an honest attempt to consider impartially all points of view that are conceivably related to a particular grievance.

Records can be extremely valuable when grievances first come up, because they enable the administrator to consult precedents for help in solving his particular problem. Although maintaining careful records on grievances takes time, the time is well spent. The few minutes devoted to making notes on an employee's grievance may save many hours in dealing with similar complaints in the future.

Purposes of a Grievance Procedure

An effective grievance procedure may serve several purposes:

1. To assure employees a way in which they can get their complaints considered rapidly, fairly, and without reprisal. Another way to put this is that grievance procedures are set up to give an employee a chance to get his complaint to the top boss or to get satisfaction along the way without losing his job. An employee may never have occasion to use a grievance procedure. There is, though, a measure of security to him in knowing that if he does have a complaint, there is a way to make a complaint known and to get something done about it. As long as people work together, however harmoniously, frictions will at times arise. Unless there is a way to express, examine, and adjust or resolve the cause of the friction, the work situation is bound to deteriorate. Nothing is more frustrating than a complaint about which nothing is done.

2. To encourage the employee to express himself about how the conditions of work affect him as an employee. A grievance, whether it is expressed or remains unexpressed, is still a grievance. Complaints which are expressed to administrators can be handled. Something can be done about them. School management has the initiative to apply policies to employees and, in most cases, decide the conditions under which they work. The employee is in the position of being told how a policy works or what his conditions of work shall be. The question is how to get a proper balance. An effective grievance procedure is one way in which an employee may express himself about complaints he has on how policies, practices, and procedures apply to him. It lets him make known to management his views on the application of the policy to him, or on how the conditions under which he works affect him. Unless an opportunity is given to employees to express themselves about their complaints, feelings become bottled up. They will find expression somehow in some form of silent resistance.

3. To get better understanding of policies, practices, and procedures which affect employees. The great majority of complaints and grievances probably arise out of a misunderstanding of the meaning of policies, practices, and procedures which affect employees. Of course, the policies, practices, and procedures should be clearly set forth and made known to employees and administrators. Administrators should be informed about the application and meaning of policies and procedures. The very act of calling a grievance to an administrator's attention gives an excellent opportunity for both employee and administrator to understand better the policies and procedures complained about. For example, an employee has a question or a complaint about a promotion policy. He tells his administrator about it. His administrator explains to the employee the policy itself, some of the background which went into forming the policy, and what it is about. He explains to him the purpose of the policy and how it has been applied in other cases. For administrators, the value of the grievance adjustment procedure at this point is that if the administrator does not know these things, he will try to find out. He needs to do this so he can discuss intelligently with the employee the basis of the complaint.

4. To instill a measure of confidence in employees that actions are taken in accord with policies. An administrator is accountable for the decisions he makes that affect employees. If his decisions are subject to some review under certain conditions, the chances are he will take special pains to assure himself that they are fair and in accord with policies and procedures. The employee knows that an administrator is accountable in many ways for any decisions he makes. One of the ways is through the grievance adjustment procedure. This procedure helps instill employee confidence in administrators' decisions. It is one of the many measures which, when added together, result in an employee's assurance that he will be treated justly and fairly.

5. To provide a check on how policies are carried out. The grievance adjustment procedure is a rather painful way to get a check on how policies are carried out. However, in a big organization where there cannot be day-to-day observation, the grievance machinery can help upper management judge how well policies are being carried out. Further, a study of grievance cases can point to the need to change policy. If, for example, many grievances arise out of the interpretation of a policy, it is wise to take a look at the policy itself, to determine, first, whether it is sound, and second, whether it is possible to carry it out. Again, grievance procedures are not the only ways to determine the need for change in policies, nor to find out how well policies are being carried out; but they can help show the need to reexamine policies or procedures.

6. To give administrators a greater sense of responsibility in their dealings with employees. An effective grievance procedure assures that decisions made by an administrator which affect employees aren't reviewed or modified until he himself has had a chance to review his decisions and modify them if the facts warrant. An effective procedure leaves the complaint in the administrator's hands until he has had a chance to reconsider his actions.

Arbitration in the Grievance Procedure

Arbitration is third-party settlement of disputes between individuals or parties outside a court of law. Labor arbitration most commonly is used to settle disputes between parties of a labor agreement as to its application or interpretation. Since such arbitration consists of determining the rights of a party to an agreement, it is referred to as a "rights" dispute or commonly as "grievance arbitration". Further, it determines what is right, not who is right.

A second type of arbitration is called an "interest" dispute. It involves the determination of the interests of the parties, as distinct from their rights under an existing agreement. It applies to a determination by an arbitrator or arbitration board of the terms and conditions of a new or renegotiated labor agreement.

The way an arbitrator views a case depends in part on his personal philosophy of arbitration and in part on his relationship to the parties. The arbitrator who is called for a single case (ad hoc arbitrator) is inclined to be a judge in most cases. The permanent umpire who handles most or all of the cases for an agency and union is inclined to be more than a judge. But these generalizations have their exceptions and should not be taken literally.

1. Purposes of arbitration

   - To resolve a dispute short of a strike or lockout.
   - A safety valve, beyond the regular grievance procedure.
   - To resolve a situation that needs a decision.
   - To test the meaning of the contract.
   - Face-saving.

2. The basis of the arbitrator's decision

   - Not what he thinks is fair, or right, or wrong; rather what he thinks the contract says in relation to the circumstances presented to him in the hearing; past practice may also be important.
   - The jurisdiction of the arbitrator is usually defined in the contract; the matters on which he may rule, and the nature of his ruling - meaning or intent of parties, application, interpretation. Usually excluded are changes, additions, deletions or modifications of the contract.

3. Types of arbitrators

   - Ad hoc, single: one impartial individual, hired by the parties for a particular case or series of cases.
   - Permanent, single: one impartial individual selected by the parties and usually named in the contract who will hear all cases for the duration of the agreement.
   - Arbitration board; ad hoc or permanent: each party appoints one or two representatives to board; board in turn selects impartial chairman; decision is by majority vote of board.

4. Selection of arbitrator

- Named in contract.
- By agreement between parties.
- Failing agreement, or by agreement on application to the Federal Mediation and Conciliation Service, the American Arbitration Association, or some professional individual, usually a lawyer, professor or judge.

5. Procedures and methods

- Formal and informal systems.
- Stipulation: May their preparation help to clarify the issue, perhaps produce a solution short of arbitration, assure a ruling on a particular dispute? Or will it tend to freeze the case, reduce flexibility?
- Briefs: Read at beginning of hearing, used as basis for presenting case even when not submitted; a matter of practice and choice.
- Opening Statement: What it's all about, what you're going to show.
- Who goes first: Not necessarily the party requesting arbitration - rather, the prosecution, the party which took the initiative in the dispute; as in a discharge, the management; in a request for a personal leave day, the union.
- Direct presentation: By the spokesperson (s); telling things to the arbitrator, possibly introducing some exhibits - to where you have an able witness with expert or first-hand information, his testimony will usually be more effective.
- The use of exhibits: Copies of contract, grievance, transcripts of earlier meetings, pictures of the job, production records, check stubs, etc.
- Witnesses: Examined (questioned) by their side, then subject to cross-examination by the other side, with the arbitrator often asking questions. May also involve re-examination. Exhibts are often introduced through witnesses and explained by them.
- Summation: Summary of major points in direct presentation, through witnesses and exhibits, with counter agruments to what other side has presented: Should be relatively brief, should include specific reference to decision wanted from arbitrator.
- Post-hearing briefs: One side or the other may request permission to file post-hearing briefs: Should not include new material unless by mutual agreement where facts were not available at hearing. May be used to stall, delaying a decision, as deadlines for filing are extended.

6. Follow-up, after receipt of award

- See that terms of award are carried out, and that situation does not arise again. Union may be resentful, attempt retaliation in same or other area.
- Enforcement: If arbitrator did not exceed jurisdiction, did not engage in fraud, corruption or other misconduct, decision is enforceable in court. Will not be set aside for errors in judgement as to law and fact.
- Award should be considered in relation to application to ther grievances, future changes in the contract.

7. Arbitration clauses

- Wording of clause most important: What may be arbitrated, jurisdiction of arbitrator, limitations on his power of decision, question of whether decision is final and binding, questions of time limits on getting case to arbitration and on arbitrator in rendering award, importance of consistency in contract, all are factors which must be considered.

Give the Arbitrator Needed Information

Thought must be given to the method of presenting cases to insure that the arbitrator be thoroughly informed as to what he should know and of the significance of what is placed before him. Do the parties present him with adequate opening statements? Are the grievances and the answers thereto written in a meaningful and understandable manner? Are the parties successful in presenting the arbitrator with a lucid statement of the question to be decided and the limits of his jurisdiction? Would it help to have some less formal and technical method of conducting the hearing? How well do the parties do in presenting exhibits which set forth the detail of the data on which they rely? Perhaps there are occasions when the orderly presentation of a case would be served best with the school system proceeding first, with basic noncontroversial material being introduced by its better informed witnesses who would be testifying from school system records as to dates, background data, events, etc. Perhaps the representatives of the parties should make a greater effort to stipulate as to basic facts which are not in controversy, thus avoiding the confusion frequently introduced into the record of the case by union witnesses who are inaccurate in their memories. These and other ways of speeding up the hearing and assuring the arbitrator a record which will enable him to perform responsibly and knowledgeably should be canvassed.

Arbitrator Needs Guidance

Finally, with respect to the avoidance of bad mistakes in the award and opinion, the parties might give thought to the best way of affording the advantages of consultation and guidance to the arbitrator. It is not suggested that the case be decided on any basis other than evidence adduced at the hearing. It is helpful to remember, however, that arbitrators, typically, work in solitude and have no opportunity to test the validity of their conclusions in discussion with others. They do not have law clerks with whom to talk out their problems as do judges. They have little opportunity to meet with other arbitrators. In some situations, the parties might consider the advisability of using a three-man panel in lieu of a single arbitrator. If they should decide to provide for a board of arbitration they might consider it wise to provide that the two members of the board designated by each of the parties should act as advisors, without vote. Or, if they regard a board as an unwieldy device, they might invite the single arbitrator to feel free to call upon the two individuals who presented the case to discuss with him, informally, and when he is ready to write his decision, any of its aspects on which he needs further enlightenment.

The quasi-judicial system under which the parties operate belongs to them. It is theirs and they can make of it what they will. If it operates badly they have nobody to blame but themselves. Any breakdown in the system leads to consequences far beyond the values of the system itself. The maintenance of effective grievance and arbitration systems is a challenge which no administrator of a labor agreement is in a position to ignore.

Mechanisms for Settling Collective Bargaining Disputes in Public Education

by Harry A. Becker

"There is no point to any further talk. This is an impasse. We're leaving." The speaker was the chief negotiator for the teacher's association. He and his associates picked up their papers and walked away from the bargaining table. The next day the press carried a statement by the association negotiators accusing the board of education of not bargaining in good faith.

It was indeed an impasse. When either or both parties announce that it is impossible to reach agreement at the bargaining table and refuse to continue bargaining, an impasse exists. An impasse is a crisis. It amounts to an announcement that the process of collective bargaining is not an effective means to reach agreement on whatever the issues are.

In theory, an impasse may be triggered by either party. In practice, the impasse is a tactic of the employee organization. The employer has nothing to gain from a breakdown of the collective bargaining process. On the other hand, the employee organization wants and needs an agreement as soon as possible. If it requires an additional month or an additional year to agree, it is likely that wage increases and benefits will be lost for an additional month or year.

An impasse may be the inevitable consequence of endless hours of bargaining without reaching agreement. Day after day, the negotiators begin bargaining as the sun is setting and continue through the night. But agreement cannot be reached on issues believed to be vital. The time arrives when the spokesman for the employee organization announces, "There is no point to any further talk. This is an impasse."

On the other hand, the impasse may be a matter of strategy. The employee negotiators may believe that they have gotten as much as they can through the process of collective bargaining, but that what they have is not enough. They may believe that by creating an impasse, pressure can be applied which will result in additional concessions. No generalization can be made about whether

an impasse is an unavoidable breakdown in the bargaining process or whether the impasse is a matter of strategy. It may be either. A judgment can be made only by carefully analyzing each case.

One has only to review the hundreds of impasses that have occurred during bargaining to realize that an impasse can occur whether or not mechanisms are provided for resolving an impasse and reaching a settlement. The impasse is a fact of collective bargaining life. However, if a process for settling the impasse has not been provided, both legal and illegal actions will occur as employees seek to force a more favorable settlement. In the field of education, impasses that have occurred during contract negotiations have been resolved sooner or later and in one way or another. Illegal methods, including the job action and the strike have usually, though not always, been effective in winning concessions that have been refused at the the bargaining table.

The principal mechanisms for resolving impasses are mediation, fact finding, and arbitration, each of which requires the services of a third party. Let us analyze the third party mechanisms most frequently advocated and used.

Mediation is a mechanism whereby a third party tries to bring about agreement between the two principal parties. The mediator may meet Kissinger style with each party separately or may bring the parties together, depending on his sense of the situation. The object of the mediator is to move the two parties closer together, that is to close the gap between the positions taken at the time the impasse occurred. The mediator works back and forth between the parties. If more than one mediator is involved, they may separate and work with both parties simultaneously.

The mediator tries to reason persuasively and convincingly with each party. He tries to show how the available conditions of agreement are advantageous to whichever party he is working with. If he succeeds in bringing

the parties close together, he will have a joint meeting with both parties. The mediation has been successful if, at that meeting, an agreement is hammered out.

The mediator needs to find a formula for settlement that both sides will accept. His job is not to determine what settlement would be right and fair. The mediator must be pragmatic. Mediation succeeds only if an when both parties agree. One mediator said, "If both parties will agree that the moon is made of green cheese, that is O.K. with me."

Mediation services are usually provided by a state agency in accordance with state law. In Massachusetts, mediation service is provided by the State Board of Mediation and Arbitration. There is usually little or no choice of mediator or of whether there will be one mediator or more than one. Mediators have no authority. They do their best to bring about settlement. Mediation can succeed only if both parties believe that the available settlement is as good as they can get.

Fact finding is another widely used third-party mechanism provided by state agencies in accordance with state law. While a mediator tries to negotiate a settlement that each party believes is to its advantage, a fact finder appeals to both parties to be reasonable and to consider the welfare of the children and the public interest. The fact finder will request that all pertinent information be submitted. He will continue his investigation by holding a hearing at which both parties as well as other persons present the facts as they see them. The fact finder evaluates all of the facts that have been obtained and issues a report which includes recommendations for settling the dispute or impasse.

The fact finder's report is public information, but is not binding on the parties. If the fact finder succeeds in getting the parties to settle, it is because both parties have been convinced that the fact finder's recommendations offer as favorable a settlement as they are likely to get and that the consequences of prolonging the impasse will be unfavorable. If public opinion has been crystallized in support of the fact finder's recommendations, the prospects of a settlement are enhanced.

As can be expected, fact finding does not always succeed in bringing about a settlement. For example, the Colorado Springs teachers overwhelmingly rejected a fact finder's recommendations to settle a dispute on the provisions of the new contract. Two days later the teachers voted to strike for the first time in the city's 100-year history. The strike lasted for twelve days.

Arbitration has the potential to be the most valuable third-party mechanism for settling disputes. It is essentially a judicial proceeding. The arbitrator or arbitrators hold hearings at which each party to the dispute or impasse submits evidence. The arbitrators render a decision which is called an award. This decision is similar to the verdict of the court in a civil lawsuit. The award spells out what action is to be taken regarding each of the issues in the dispute. There are two kinds of arbitration: binding arbitration and advisory arbitration. Compliance with the award is compulsory in binding arbitration; in advisory arbitration, compliance is optional. Each party considers the award and decides whether or not to accept it.

School boards and state legislatures have been wrestling with the problem of what to do about arbitration since the famous Norwalk, Connecticut case in 1951. This case arose as part of the aftermath of the 1946 Norwalk teacher strike, which was one of the first teacher strikes in the United States. Along

with the animosity engendered by the strike, the Board of Education and Teachers Association quarreled bitterly abut their respective rights and their correct relationships. The Teachers Association claimed both the right to negotiate a group contract and to employ arbitration to settle disputes. Legal counsel for the Teachers Association encouraged the lawsuit in the belief that the court would mandate binding arbitration as the mechanism to use in settling disputes. In the Norwalk case, the Connecticut Supreme Court of Errors rendered a declaratory judgment which was intended to provide guidelines for the relationships and rights of both the Teachers Association and the Board of Education.

The declaratory judgment of the Connecticut Supreme Court of Errors limited the use of arbitration in the Norwalk case "to certain, specific, arbitrable disputes." Twenty-five years later, this decision still prevails in Connecticut.

In grievance procedures, it has become common practice to mandate some type of third-party procedure as the final step. Some grievance procedures even provide for binding arbitration. Grievances usually deal with issues of liability. An individual or a group claims that under the contract or established policies, they are entitled to some benefit or privileges such as more pay or more time off. The issues are certainly important to the individuals concerned, but the stakes are relatively small to the Board of Education.

On the other hand, when a collective bargaining agreement is being negotiated the stakes are high. It make a big difference what new fringe benefits and salary schedules are established. These and other policy decisions can commit very large amounts of money. In the Norwalk case, the

Connecticut Supreme Court of Errors declared that under existing Connecticut law, it would not be legal to delegate policy decisions to a third party.

In the twenty-five years since the Norwalk case, the Connecticut legislature has enacted several laws which establish and regulate collective bargaining in public education. There has not been legislation, however, to either require or empower Connecticut school boards to use binding arbitration to settle collective bargaining impasses. The situation is similar in most of the other states. Only a few states provide for some form of binding arbitration. Wisconsin, for example, permits binding arbitration, but only if both parties enter into it voluntarily.

What conclusions can be drawn about the effectiveness of the available mechanisms for settling collective bargaining impasses? In most situations, if binding arbitration is available at all, it is available only for grievance actions. The mechanisms which are available in collective bargaining impasses are not effective.

Teacher strikes have become more and more common. In the 1969-70 school year, there were 181 teacher strikes. In the fall of 1975, 170 teacher strikes kept an estimated 2,000,000 children from attending classes. Teacher strikes are occurring in all parts of the country and in school districts of all sizes. In general, teacher associations are ready to accept binding arbitration; school boards and legislatures are not ready. Why is this so? Judging from the statements made by those who are opposed to teacher strikes, it is a carry over from the time when school boards could dictate salaries and working conditions and it was not necessary to reach a bilateral agreement. A retired teacher who opposes teacher strikes said:

> No one should be permitted to shut down a government operation for which taxes have been levied. . . . Public employees are a part of government, and strikes by government are intolerable and undemocratic too. . . . Strikes by government employees are a step on the road to chaos and anarchy, as well as a defiance of the voters and elected officials.

Another educator who opposes teacher strikes declared:

> Teachers who violate the law should be dealt with severely. They should know better. Law-breaking teachers cannot possibly instill in their students a respect for the law. In states with no-strike laws, contracts should include the stipulation that any teacher who violates the law is automatically fired.

Some who are opposed to legislation to provide binding arbitration believe that binding arbitration would give teachers greater benefits than they could otherwise obtain. These people prefer a weaker mechanism such as advisory arbitration because advisory arbitration awards can be accepted or rejected by the Board of Education. What they overlook is that advisory arbitration awards can also be accepted or rejected by the teachers association. Under present conditions, it is actually possible for the teachers association to reject the advisory arbitration award, go on strike, and obtain a settlement which is more favorable than the arbitration award.

This happended in Norwalk, Connecticut in 1969. Contract negotiations were stalemated and an impasse was declared. After mediation efforts failed, the dispute was submitted to non-binding arbitration. At issue were wages and fringe benefits with an estimated cost of approximately $400,000. The arbitrators's award provided wage and fringe benefits with an estimated cost of $100,000. The board of education voted to accept the the arbitrators' award, but the teachers association rejected the non-binding award and voted to strike. An injunction forbidding the strike was ineffective. After a four-

day strike, the board of education and the teachers association reached a settlement with wage and fringe benefits having an estimated cost of $300,000. This settlement was duly ratified by the Common Council of the city.

Had there been binding arbitration, the settlement would have been in accordance with the arbitrators' award. The cost to the City would have been approximately $200,000 less. Even more important, everyone would have been spared the turmoil, disruption, and animosity engendered by a strike.

Tom James reached the conclusion some years ago that "the record of state action promises that teacher power has little chance of becoming the ogre that many people expect." However, times have changed. Increasingly, teachers are unwilling to accept wages and conditions that they believe are unsatisfactory. Terrel H. Bell, U. S. Commissioner of Education, recalls how it used to be:

> . . . Each year, we simply drew up a new salary schedule and presented it to the teachers as a gift from the benevolent father. And the teachers, hats in hand, said, 'Thank you.'

Paul Friggens pointed out that this is no longer the case, and Ronald Corwin said that what seems to be new about teachers "is the scope and intensity of teacher militancy." Public school teachers are determined to have an active role in the decision-making process. To achieve this they are well organized, and when they believe it is necessary, teachers will violate anti-strike laws.

The thousands of teachers who are willing to strike are not ordinary criminals. Many of them strike reluctantly and with the conviction that there is no alternative. As one teacher expressed it:

> Teachers who have exhausted the legal remedies available (labor boards, mediation, fact finding, etc.) and are still faced with no possiblity of settlement after long, weary months of attempting to be reasonable may be left with only two choices: strike or crawl back on their knees. In such a case, there is really only one choice to make. If legislators, school boards, et. al. deplore strikes, then it behooves them to provide strong alternatives through which public employees may seek redress for unresolved disputes. . . .

Here is a teacher who prefers binding arbitration. Under present legislation, however, the strike is the only available action that is effective. This is how he expressed his view of strikes:

> Strikes are disruptive, costly, and technically illegal; they are also effective when all else fails. Without them we are reduced to humbly petitioning the elected school officials for whatever they are disposed to offer us--take it or leave it. A system of binding arbitration would be a major improvement and an acceptable substitute, but until a fair workable plan is offered, we're stuck with the strike. . . .

More and more people believe that under existing circumstances, teacher strikes are justifiable. The widespread sympathy for striking teachers is illustrated by the New Haven teacher strike in the fall of 1975. The judge jailed 90 teachers for violation of a no-strike injunction. 1,000 non-teaching school employees staged a sympathy walkout over the jailing of the teachers. Labor leaders, angry over the judge's refusal to release the 90 jailed striking teachers, called a one-day city-wide walkout by 30,000 union workers. The walk-out was approved by all 146 leaders of the 92 unions comprising the Greater New Haven Central Labor Council. The President of the Greater New Haven Central Labor Council called the jailings "a miscarriage of justice. These people are not criminals. They are not lawbreakers, no matter what the judge says."

Penalties imposed by the courts are not effective deterrents to teacher strikes. When teacher strikers are sent to jail, they often receive admiration, sympathy, and increased support.

In the New Bedford, Massachusetts strike, 27 teachers were jailed and the teacher association paid a fine of more than $337,000. As a result, teacher associations throughout Massachusetts launched a campaign to support the New Bedford Teachers by contributions to pay the fine. As has been noted, in the New Haven strike, jailing 90 teachers only produced a sympathy walkout by 30,000 union workers.

Striking teachers have learned to insist on so called "no reprisal" or "amnesty" clauses in a settlement. The purpose of these clauses is to prevent the board of education and administration from punishing or discriminating against the strikers. Colorado Springs suffered a twelve day strike in December, 1975. The teachers rejected a settlement solely because it contained insufficient amnesty provisions for the 1,200 strikers. When the amnesty provisions were improved, the teachers accepted the settlement. The amnesty provisions obtained by the Colorado Springs strikers included the following:

1. striking teachers will return to the same positions they occupied prior to the strike;
2. there will be no board retaliation against members of the CSTA negotiations unit, nor any teachers who participated in the walk out;
3. there will be no retaliation against CSTA members for picket activities;
4. there will be no strike-related entries made in teachers' personnel files;
5. teachers close to retirement who participated in the strike retain full-service credit.

There is no doubt that legislation on impasse resolution is needed. In the opinion of this writer, however, there is confusion as to what that legislation should provide. Legislation that will provide an effective mechanism for settling collective bargaining impasses in an equitable manner is required. Binding arbitration as the final step for resolving impasses is an effective mechanism. This writer recognizes that possibly it is not the only effective mechanism. Legalizing strikes in public education, however, does not provide due process for settling impasses. The strike is an extreme form of protest. Legal or not, there have been hundreds of strikes in public education every year. Unless an effective mechanism is provided, there are likely to be

hundreds of teacher strikes in the years ahead. Legalizing teacher strikes does not solve the problem. For all concerned - teachers, children, taxpayers, the strike is a disruptive, disturbing, wasteful, and expensive action. Moreover, strike action does not necessarily lead to the equitable settlement of an impasse. The solution which is forged in the heat of a strike may be based on pressure and emotion. Moreover, the animosity that thrives during a strike and the recrimination that follows it, provide a poor climate for harmony and cooperation in the day-to-day administration of schools following settlement.

Contract Language in Collective Negotiations

by Fred Lifton

If you remember anything about this subject, I hope you will take away one cliche , one which we emphasize as the most significant premise in collective bargaining. It far outshadows all of the interesting questions about who should bargain and how and the scope and the procedure although they are by no means unimportant. That cliche is, "You get what you write." It's not very elegant, but it is very important because the contract is what all of the noise, shouting, confusion and unhappiness is all about. The object of collective bargaining is to obtain an agreement, and the agreement is what you are going to live with. Everything else pales into insignificance, for it doesn't matter so much how you get there as to what you end up with.

It is important to distinquish the collective bargaining agreement from board policy. Now, board policy is extremely important for a variety of reasons, but it's quite a bit different from a contract. You can write a board policy, and if it doesn't work you change it. In fact you may establish a policy which is deliberately innovative, because you know that if it does not succeed you can change it. You know, too, that barring unusual circumstances, even if you are so careless as to violate your own policy, there isn't much ordinarily that's going to happen to you of a punitive nature. I'm not suggesting that you do not need a well written policy. But the consequences of badly written policy are much less severe that the consequences of poorly written contract language. An example of badly written policy would be, "The policy of this school district is to employ the most qualified teachers available." Well, that couldn't be your policy unless you're in one of those rare districts that has an unending supply

of money. Besides, it might get you into an interesting employment discrimination case one of these days. Language like that in a contract can be a serious problem because you cannot just change your contract as you can your policy. You have to renegotiate it. Moreover, extricating something from a contract is enormously more difficult than keeping it out in the first instance. In addition, of course, a contract cannot be changed at all for a fixed period of time. If you try to violate it, someone will almost surely have an arbitrator or a court enforce it. So you don't want to make mistakes.

I'm sure that many of you have been assigned to write documents single-handedly. You have discovered in doing so that it is not without its difficulties even when you have full control over what words go on that piece of paper, because the English language is a very tricky medium. I know when I went to law school there was, I remember, a period of disillusionment when I was being taught that I didn't know how to read the English language, and I had never read any other! It is a very difficult language and all kinds of problems are inherent in it. When you're negotiating a contract you not only have the difficulties that you have when you write it, but you have added difficulty because the opposing negotiators attempt, naturally enough, to urge their choice of language upon you. The very bilateral nature of the negotiation's enterprise dictates an inability to "have it your way" all of the time.

There is a common problem which arises in the negotiation of the language across the table. Frequently when language is proposed, the parties hear what they want to hear and do not stop to think about what the language really means. Therefore we need to think very carefully about what the language means and to look for possible ambiguity. If you believe that a point may be interpreted in some other way, restate it in other words. This forms what we sometimes call negotiations history.

Sometimes, on the other hand, a good negotiator will deliberately avoid pinning the meaning of the language down, for sometimes it is in the interests of both parties to leave the language loose since precise language may make it impossible for one side or the other to accept the document at all. There is inherent calculated risk in this approach, certainly, and obviously, the desirable thing to do is to retain slippery language when it benefits you and excise it when it favors the opposition. This is difficult to accomplish, of course. For instance, when do you use the word reasonable in contract language? The answer is very simple--when it's reasonable to do so. Sometimes you're content to do that; at other times you'll insist on tight language. You will find that at certain times during negotiations one side is arguing for tight language while a few moments later the roles are reversed.

Let's look at some general problems of ambiguity. Let's take a simple word like days. What does it mean? Calendar days? Week days--whatever that may mean? Does it include weekends? Does it include holidays? Legal holidays as opposed to school holidays? Does it mean teacher employment days? Does it mean student days? Obviously it can mean any or all of those depending on the intended context. If you don't qualify your words you have a potential ambiguity. One came to my attention the other day: "If teachers participate in an outdoor education program of the district, they shall be paid an extra sum of $25.00 per day.'" Simple language. Trouble is they started off on their outdoor education program at 10:00 a.m. on Wednesday. They returned at 3:00 p.m. on Friday. How many days did they get paid for? Two or three? Let's look at another example. A phrase that appears frequently in a recognition clause states "The Board of Education agrees to recognize the union as the exclusive bargaining agent for all certified employees." I would hazard a guess that when that language is used,

usually both sides have a fairly clear idea of what is meant. It's even possible that they mean the same thing. But do they mean what they said? If you say, "all certified employees," you are conceivably including administrators, now and hereafter hired; you are including all part-time people; you're including anybody who has a certificate--substitutes, teacher aides, paraprofessionals, maybe even bus drivers. They may not be "certified" in the way that you had in mind when you used the word, but they are certified.

Consider this: "The parties agree to negotiate in good faith with respect to salaries and other matters of mutual concern." What does it mean? It means that you have agreed to bargain about everything. Perhaps when the board bargainer saw that language he thought that the language meant bargain upon all matters mutually agreed upon. "Mutual concern" and "mutually agreed upon." They sound alike but they have opposite meanings. Within the context of bargaining scope, saying "mutual concern" means that you agree to bargain matters which are of unilateral concern. If it's a concern to one, it's a concern to both.

Another example of language is, "The board may require a teacher to take a physical examination." Any problem? Well no, but it probably doesn't say what you wanted to say because most of the time when you have the occasion to have someone take an examination, it's not a physical examination that you want them to take. It's a mental examination. So you're better off saying "a medical examination" rather than "a physical examination."

"No teacher shall be evaluated without his knowledge." What you mean to say, of course, is that no teacher shall be formally evaluated without his knowledge. As this is written, if an administrator were to observe a teacher commiting a crime or beating a student or whatever, he couldn't "evaluate" because the teacher wouldn't be aware of his presence unless he tapped the teacher on the shoulder and said, "I'm here."

Sometimes people use what are called words of art in negotiation. Fortunately there aren't too many and you have probably heard most of them. One example is "to negotiate in good faith." The meaning of this phrase has been interpreted, reinterpreted and evaluated in hundreds of cases in the private sector. There are definitions that are pages long. Now I think that it is foolish to expound at such length, for I think this has a specific meaning. By the way, for those of you who aren't familiar with this process yet, "to negotiate in good faith" does not mean to agree. You can still say "no" in good faith.

Board members salivate like Pavlov's dog when you say "just cause," so this phrase doesn't require too much explanation either. It's also one with a long history, a lot of detailed judicial interpretation, and its own specific meaning. However, after years of conditioned response to "just cause" in teacher contracts, it's sometimes difficult for board members to understand that in contracts with nonprofessional employees the phrase may be perfectly acceptable.

There are occasions, though, when people don't consider the implications of the language. Consider: "The hours, salaries or other working conditions of teachers shall not be altered unless agreed to by the association." This, of course, is the "maintenance of standards" clause and board members have learned to respond to seeing Article so and so, Maintenance of Standards by saying, "Ah ha, we can't have that." What they aren't always ready for is to have the union hide the clause within the document with no label at the top of the page.

Concerning preambles, I enjoy those which declare that the board agrees that in order to have a successful school system, the employees should work under conditions which make them happy. That's standard language. People gloss over it because it is in the preamble. Consider the possible implications, however.

Incomplete statements are another fairly serious problem. Consider a couple of examples. Regrettably, this example comes from something that I wrote--many years ago, of course! "All elementary teachers shall have thirty minutes of preparation time daily during the student day." There is no problem if you have a physical education or an art or music teacher coming into the classroom during each day while the classroom teacher has time off for planning.. What about the librarian? Should the librarian be free for thirty minutes? What about the special education teacher when there's no one to go into that classroom for that period of time? What about the kindergarten teacher, who has more time off than anyone else but has no time off during the "student day"? The hardest part of writing contract language is looking at the language and trying to anticipate all of the situations that may occur. It's easy to develop contract language which will deal with what's going to happen 95 per cent of the time, but virtually impossible to cover the remaining five per cent. The object is to try to conceive of all of the crazy situations where this same language might apply. Unless you write exceptions into the contract, its statements will ordinarily apply. I say "ordinarily" because there may be circumstances where you can use past practice or some other factor to get yourself out of a situation. But the basic rule of contractual construction is that when the language is clear and unambigious it will be enforced. Ordinarily you don't have the right to study the negotiation history, the intentions of the parties, or past practice unless the language is ambigious or unclear.

Let's talk about another: "The board shall grant no less than five years credit on the salary schedule for prior teaching experience." Someone applies who has spent five years teaching on an Indian reservation in Peru. Are you going to give credit for five years of teaching experience for that? Do you think that that is far-fetched? That was the subject of an arbitration case which

I tried last year. When you say "teaching experience", do you mean in public schools? Do you include parochial schools? Do you include out-of-state schools? Do you include military experience? This suggests once again that the contract must contain complete statements.

This example comes from an actual arbitration case in Michigan: "No teacher shall be reassigned without his consent." This may be sexist language, but that's not the problem. The arbitrator saw a school district that desperately had to make changes in staff assignments for financial reasons and wanted to move a music teacher from a high school to a junior high school. The arbitrator said to the school board, "You have made a clear case of the need for this change. Unfortunately, Board of Education, you also said very clearly in your contract, 'No teacher shall be reassigned without his consent.' He has not given you his consent. Therefore, you may not reassign." In general, "You get what you write."

A common characteristic of incomplete contracts is the salary schedule. Nearly all salary schedules follow the conventional pattern of vertical steps showing years of experience and salary columns showing horizontal educational attainment. If you have such a salary schedule, what have you done to your right to hold someone at his present level if he performs poorly? Probably you have given it up. You haven't said a word about giving it up but you probably have by including the salary schedule and not reserving your right to prevent an employee from moving to the next step. You can say a lot by saying nothing.

There are other problems with the conventional salary schedule. Usually the first column is headed "B.A. plus 8." You all know that "B.A. plus 8" means that you have a Bachelor's degree and you have eight hours of study. Now someone walks in with eight under-graduate hours from Maharani University. Do you grant advancement on the salary schedule? Perhaps. You may have a fair

argument for going to past practice in this situation, but you still haven't said anything in your contract about whether these hours should be graduate or undergraduate, or whether they should be taken at an accredited university, or whether there has to be prior approval of the superintendent or his designee, or whether they have to be taken before or after the degree was granted.

Here is a simple statement, similar to one which appears in a great many contracts: "Each teacher shall be allowed two days personal leave each year. Application for such leave shall be made to the superintendent." Well, if anyone finds less than fifteen ambiguities there, he has failed the test! Let's consider some of the problems with that language. Does the employee get the leave upon saying that he's going to take it or does he have to ask for it and does the superintendent grant it at his discretion? There are arguments on both sides, and I can't tell you what it means. It says "personal." "Personal" connotes a choice for the individual. It says "shall be allowed," which indicates that it's the teacher's right. On the other hand, it says "application." What constitutes an appropriate use of such leave anyway? It says "two days each year." Are they talking about the school year or the calendar year? It says "two days." Is that with pay or without pay? Does the teacher have to reimburse the substitute? Can he take it in half-day increments, or as I have sometimes been asked, in ten-minute increments? When does a person give his notice or application? How far in advance? Does it have to be in writing? Where does it have to be submitted? It says "to the superintendent." What if the superintendent is out of town? Can you ask for it after the fact, and if so, under what circumstances? What happens if you don't use it? Does it accumulate as annual leave or otherwise? Language like this is what keeps arbitrators in business.

Let me tell you about an arbitration case that I have pending at the moment. A teacher claims a day of personal leave. In this case the contract asks the teacher to certify that the leave will be used for something which can't be accomplished except during school hours. She filed for certification, and it accidently came out that she trains dogs on the side. She wanted to take some clients to a dog show which started on Friday, so she took personal leave on Friday. Should the District pay or not? Nobody seems to be too sure. We've advised them not to. This is one of those 50-50 cases.

In another actual case where language of this nature was applicable, a teacher came to the superintendent and said, "I want to visit my sick mother," and indeed she had a sick mother. The superintendent said, "Fine, you go visit your sick mother but I want you to use sick leave rather than personal leave." The teacher was stubborn and said, "I want to use personal leave. I want to save my sick leave. Personal leave doesn't accumulate." Did she have a right to do this? The arbitrator decided in her favor. The contract didn't specifically exclude using personal leave for something for which sick leave could be used, and I'm not saying that it should. This merely demonstrates the kind of question that will arise.

Last year we had a situation where a teacher whose wife was the organist for a professional ball team decided to accompany her to her training session. Was this a valid use of personal leave? I don't think so, but do be careful with your contract language. Finally, what if your entire staff were to claim a day of personal leave on the same day? You would be in the rather embarrassing situation of financing a teacher association work stoppage. As you can see, there is a long list of problems, even with something as simple as personal leave.

On the other hand, it is quite possible to say too much. Perhaps you are feeling proud of yourself for having managed to get this statement into the contact: "A teacher who shall not report for duty and was not on leave shall have 1/185 of his annual salary deducted for such day." What have you gotten? Nothing. Undoubtedly you have that right in any event, so why put it into the contract? You don't have to put rights that you already have into the contract. You say, "I haven't lost anything either." I think that perhaps you have. If you say in the contract that this is what happens to a teacher who stays away from school without authorization, you may have abandoned your right to discipline that teacher in any other way. You have prescribed the penalty as the loss of a day's salary and by so doing, you may have given up your right to put a reprimand in the file, or to consider discharge or suspension.

Another example of this is the board's requiring a teacher who has been absent for three consecutive days to have a medical examination. In most states this accomplishes absolutely nothing because the board already has that right. However, you have probably abandoned your right to require a medical examination for an absence of less than three days, and there may very well be times when you want to do so, such as when a "sick-in" occurs.

A far more serious example of saying too much in the contract is the insertion of an incomplete mangement's right clause. Whether or not management's rights should be mentioned at all will depend upon your negotiation's history and upon the statute in your particular state. But the worst thing that you can do under any circumstances is to put in a management's rights clause that lists a number of rights but doesn't cover all of them (and I defy anyone to think of them all). The implication of the list is that you have given any others away.

Contract language also has to be viewed in context. In one arbitration case the contract had stated that, "The board may grant sabbatical leave to teachers," and the association contended that within the particular context "may" meant "shall." Another district had a multi-year contract with an economic reopener and a no-strike clause. It included the statement, "If the union exercises its right to reopen for economic reasons, the no-strike clause shall thereupon be abrogated." The union, of course, declared that legally the board had given its blessings to their right to strike if there was a reopener.

I would like to briefly mention three other items before I close. In the first place, although we all know that it's desirable for the board to be aggressive about proposing statements to be included in the contract, the fact is that language which if offered by the board but which is not in fact written into the contract after the negotiation may have a considerable and disastrous effect upon the subsequent interpretation of that contract. You take another risk if you slip an "incorporation" phrase into even a succinct and carefully written document. Accepting any definition of a grievance other than the narrow definition is an example. If your definition of grievance includes such language as "policy and practice of the board" or "the right to fair treatment," you have agreed that everything is grievable. Consider the statement, "Upon the execution of this agreement, the agreement shall become part of the policy and the policy shall become part of the agreement," or "The board agrees not to deny any teacher his rights under the statutes and constitutions of this state and of the United States." I don't suppose that you were planning to deny those rights, but what have you just done? You have incorporated all of the laws and constitutions, including the due process and equal protection of law clauses of the 14th Amendment into your contract, thereby making all of them grievable under it.

Finally there is the dangerous practice of using some redundant or "garbage" language, included to add length to the contract and make it look official. If your law requires that you give your teachers a duty free lunch period, you might say, "Every teacher shall be guaranteed a duty free lunch." You haven't given them anything they didn't have, of course, but you have made the alleged violation of that statute grievable under the contract when it wouldn't have been otherwise. Let's go back to a sentence I used earlier, "Upon execution of this agreement, the agreement shall become part of board policy." What does that mean? It means nothing, but there is some danger that when an arbitrator or a judge gets his hands on language like that, he will say, "Now they couldn't have been so stupid as to put something so obvious into the contract; therefore, they must have meant something by that language."

Your last offensive when all else fails is to claim that you didn't mean what you said and that you can't be held responsible for it because you are a Board of Education and have the responsibility under the law to administer the district properly. We just persuaded the Illinois Supreme Court to say that the board does not have the right to give up their determination of who gets fired and who gets tenure, even though they had explicitly given it away, but it took five years to do it and we lost in two lower courts.

Watch your language. Be precise when you want to be precise. It matters whether you say, "I shall seek to do it," "I may do it," "I shall make an effort to do it," "I shall make a reasonable effort to do it," "I shall make every effort to do it," "I will do it if it's feasible," or "I'll do it except in an emergency." They each mean something different, depending upon the context. Read a grievance arbitration award whenever you can and you will begin to see the problems. You will begin to see how people dig into contract language after it's written and the extent to which that language is taken apart. The

punctuation of a sentence or the location of a word in it become of supreme importance. Unfortunately, it doesn't usually appear so important when it is written. Furthermore, unions are required to press you in some way in order to justify their existence. Since you cannot make many economic concessions at the present time, they are likely to take issue with the contract language. Once a statement is in any contract, even the expired one, it is difficult to get it out.